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No. 83-1987

Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1984

HENRY C. BRADSHAW,

Petitioner

v.

GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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99pp.

The petitioner, Henry C. Bradshaw, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 2, 1984.

QUESTION PRESENTED

Whether, in a first degree murder case based upon circumstantial evidence, the failure of trial counsel to know the basic criminal procedural rule respecting the number of peremptory challenges is not, as a matter of law, ineffective assistance of counsel.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is set forth in the Appendix, and is reported at 726 F.2d 115 (3rd.Cir. 1984). The Opinion of the District Court of July 1, 1982, denying Petitioner's second 2255 petition, is set forth in the Appendix. The Opinion of the District Court of November 3, 1980, denying Petitioner's first 2255 petition, is set forth in the appendix.

STATEMENT OF JURISDICTION

The judgement of the Court of Appeals for the Third Circuit was entered on February 2, 1984. Thereafter, on February 28, 1984, the Court of Appeals for the Third Circuit denied Petitioner's Petition for Rehearing. This Petition for Writ of Certiorari, as calculated by the rules of this

Court, was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

STATUTES INVOLVED

This case involves Federal Rule of Civil Procedure, Rule 24 (b), which states:

> (b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to six peremptory challenges and the defendant or defendants jointly to ten peremptory challenges.

> If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to three peremptory challenges. If there is more than one defendant, the Court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

STATEMENT OF THE CASE

On November 12, 1976, Petitioner was charged with first degree murder. Trial commenced February 28, 1977. At the start of jury selection, the trial judge allowed defense only five peremptory challenges, instead of the ten permitted under F.R. Crim.P. Rule 24(b), the applicable law at the time. Defense counsel used all five peremptory challenges.

In Petitioner's §2255 Petition to the District Court, Petitioner alleged that trial counsel failed to provide him with effective assistance of counsel as re-

quired by the Sixth Amendment to the Constitution. In his Petition, Petitioner alleged that trial counsel was ineffective in that:

> (a) Trial counsel failed to know the law with regard to the number of peremptory challenges and thereby restricted the defense to only five challenges rather than the ten Petitioner was entitled to under the law.
>
> (b) Trial counsel failed to investigate two crucial witnesses. Petitioner had informed trial counsel that these witnesses could aid in Petitioner alibi defense. Even though both witnesses whereabouts were readily available to trial counsel, trial counsel failed to even contact these witnesses.
>
> (c) Trial counsel neglected to request the Court to direct any questions to the prospective jurors concerning their acquaintance or relationship with government witnesses and in particular with respect to the prosecuting police officers.

Petitioner's Petition provided the name of one witness and further provided a ready means of ascertaining the names

and addresses of both witnesses. Petitioner also specifically detailed how the jury may have been prejudiced.

Having not been afforded an evidentiary hearing, Petitioner was unable to provide further facts with regard to trial counsel's preparation or what precisely the witnesses would have testified to.

The Third Circuit, in upholding the District Court's Order, briefly discussed all three claims of Petitioner. The Third Circuit found that no evidentiary hearing was needed because, even if trial counsel had been unprepared to discharge his function with regard to peremptory challenges, their unpreparedness did not amount to Constitutionally ineffective assistance of counsel. Petitioner now, after denial of rehearing, has brought this Petition seeking to obtain a hearinb before this Honorable Court.

REASONS FOR GRANTING THE WRIT

On February 28, 1977 the jury was empanelled in the trial of Mr. Bradshaw for first degree murder. The specific law at the time of the jury selection as well as long before and at the present time entitled Mr. Bradshaw to 10 peremptory challenges. The trial court in violation of the law, allowed Mr. Bradshaw only five peremptory challenges. On direct appeal of this issue, based upon judicial error, the Third Circuit held that trial counsel had waived objection to the District Court's ruling and stated:

> Once told by defense counsel that he would "double check" the law on peremptory challenges, the Court was justified in assuming that counsel would do so and bring any error of law to the Court's attention. Instead, the argument of law on the number of strikes is presented now for the first time on appeal. Under these circumstances

> we hold that counsel waived objection to the denial of five additional peremptory strikes.

Government of the Virgin Islands v. Bradshaw, 569 F.2d 777 at 781 (3rd Cir. 1978).

Subsequent to this ruling, Mr. Bradshaw through a Section 2255 Petition, based upon ineffective assistance of counsel, sought either an evidentiary hearing or a new trial because of his trial attorney's failure to object to the restriction of or even know the law with regard to the number of peremptory challenges.

The District Court, in a holding which was affirmed by the Third Circuit, stated:

> To take the Judge's word on this point should not be deemed incompetence under the test in Moore.

App. 40a. In affirming this holding, the Third Circuit referred to counsel's "acquiescence" as "unfortunate" and stated:

> His mistake reflected no lack

> of preparation or deficiency in his basic knowledge of criminal practice and procedure in the Federal Court.

Government of the Virgin Islands v. Bradshaw, 726 F.2d 115 at 120 (3rd Cir. 1984).

The jury in Mr. Bradshaw's case was empanelled on February 27, 1977. The proposed amendment, limiting peremptory challenges to five, had been postponed on July 8, 1976 until August 1, 1977. On July 30, 1977 the proposed amendment was rejected. Therefore, not only was the rule not in effect at the time of Mr. Bradshaw's trial but, in fact, it had never been in effect. Further the empanelling of the jury took place over seven months after Congress had postponed the effective date of the amended rules.

This case squarely presents the unresolved issue of whether, when viewed prospectively, counsel under the Sixth Amend-

ment must have some minimum knowledge of basic criminal procedure in order to provide constitutionally-mandated effective assistance of counsel.

In the recent case of Washington v. Strickland, __U.S.__, 52 U.S.L.W. 4565 (1984), this Court for the first time enunciated standards concerned with the effective assistance of counsel where specific errors of counsel were alleged. This Court stated that the Sixth Amendment required "reasonably effective assistance" of counsel. Id. at 4570. The Sixth Amendment did not contemplate hard and fast rules but

> It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. Id. at 4570.

While the Sixth Amendment was not intended

to set standards which would reform or improve our legal system, neither was it intended to lower the level of reasonably effective counsel to a point which makes meaningless a right under the law which has historically been recognized as "essential in contemplation of law to the impartiality of the trial." Lewis v. United States, 146 U.S. 370 at 378, 13 S.Ct. 136 (1892).

The American Bar Association standards relating to the basic duties of a criminal defense attorney state:

> The lawyer should prepare himself prior to trial to discharge effectively his function in the selection of the jury, including the raising of any appropriate issues concerning the method by which the jury panel was selected, and the exercise of both challenges for cause and peremptory challenges.

ABA Project on Standards for Criminal Jus-

tice, The Defense Function, Section 7.2 (1974) (emphasis added).

This ABA standard makes it clear that a criminal defense attorney, in order to even minimally perform his function, must know the rule as to the number of peremptory challenges.

This standard is further strongly supported by case law.

> Where defense counsel is so ill-prepared ... that he fails to understand the basic procedural requirements applicable in Court, we have held that counsel fails to provide service within the range of competency expected of members of the Criminal Defense Bar.

Young v. Zant, 677 F.2d 792 at 798 (11th Cir. 1982). In Young the Court found that even though counsel provided adequate representation at all phases of the trial, his failure to inform himself of Georgia's bifurcated proceeding in death penalty cases rendered his assistance ineffective.

What the Eleventh Circuit quite properly recognized is that a criminal defense attorney has a duty to make an "independent examination of the law especially basic procedural law." See generally, Von Moltke vs. Gillies, 332 U.S. 708, 68 S.Ct. 316, 322 (1948); Goodwin vs. Bulkrom, 684 F.2d 794, 805 (11th Cir. 1982) (counsel failed to understand the "fruit of the poisonous tree doctrine"); Nero vs. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (counsel failed to know that Defendant was entitled to a mistrial because of admission of evidence of past convictions); Rock vs. Zimmerman, 543 F.Supp. 179, 196 (M.D.Pa. 1982) (counsel's evident failure to know the law with regard to suppression of evidence).

The Third Circuit, unable to cite authority for their radical departure from

the above-cited cases, analogized trial counsel's unpreparedness to cases where trial counsel had failed to anticipate distant future changes. Brunson vs. Higgins, 708 F.2d 1353 (8th Cir. 1982) (the Court found that lawyers had no duty to raise issue of law which was not charged until 2½ years later); Honeycutt vs. Mahoney, 698 F.2d 213 (1st Cir. 1983) (the Court held that counsel need not raise the recent law of a lone circuit court where change did not occur in state court until two years after trial); see also, Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971) cert. denied, 404 U.S. 897 (1971) (cited by the Third Circuit but ineffective assistance of counsel wasn't even raised).

In the instant case, Mr. Bradshaw was on trial for first degree murder and facing a penalty of imprisonment for the rest

of his natural life. The prosecution's case relied entirely on circumstantial evidence. Mr. Bradshaw had witnesses who testified that he was elsewhere at the time of the murder. The jury's decision was, therefore, necessarily based upon its belief as to the relative credibility of the witnesses. Therefore, the fact that some jurors may have had biases and prejudices, which led them to give greater credibility to the Government's witnesses, is not only a significant factor but very well may have determined the outcome of Mr. Bradshaw's case. Faced with this scenario, Mr. Bradshaw's counsel went into Court wholly unprepared and ignorant of the law with regard to peremptory challenges.

The fact that counsel need not function as an oracle is hardly support for the proposition that reasonably effective

counsel, in a case such as Mr. Bradshaw's, need not know basic and important procedural law seven months after it was not changed.

It cannot be said as did the Third Circuit that because the attorney "performed capably at trial" that reasonably effective assistance has been provided. Government of the Virgin Islands vs. Bradshaw, supra. at 121.

> The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation in preparation of the case ... Moore vs. United States, 432 F.2d 730 at 739 (3d Cir. 1970).

The error in the instant case has nothing to do with performance but instead deals with extremely basic knowledge of the law. While a counsel's performance at trial is subject to a myriad of far-ranging possibilities and variations, knowledge of the Rules of Criminal Procedure, especially

Rule 24(b), requires only that counsel open a book and read the printed word. Printed words which do not vary from place to place or situation to situation.

The Third Circuit stated the applicable standard as "the exercise of the customary skill and knowledge which normally prevails at the time and place." Government of the Virgin Islands vs. Bradshaw, supra., at 120, citing U.S. vs. Moore, supra. at 746. The Court in Moore derived its standard from the Restatement of Torts, §299A. Section 299A sets forth a general standard which the Restatement feels should be applied to determine whether, for purposes of determining negligence in tort actions, the requisite degree of skill and knowledge has been exercised. The critical words in this standard appear to be "at the time and place."

There is an implied reasoning within

the Third Circuit's Opinion that because neither the Judge nor prosecutor knew the proper law, it was permissible for the defense attorney to also be ignorant. This type of reasoning is and should be totally abhorrent to Sixth Amendment guarantees of reasonably effective assistance of counsel. As this Court has stated, ours is an adversary system. An adversary system does not rely upon defense counsel taking the prosecutor's and the Judge's word on the law. If this were so, reasonably effective counsel need never independently investigate the law, since, he would never need to preserve any objection or make any motion where the Judge or prosecutor has improperly applied the law. Under such a standard, counsel hardly "will fulfill the role in the adversary process that the amendment envisions." Washington vs. Strickland, supra. at 4570. The fact

is that whether the prosecutor or Judge misunderstood the law is irrelevant. Constitutionally-guaranteed right to effective assistance of counsel was not meant to vary from pretrial meeting to pretrial meeting based upon the legal preparedness of the individual judges and prosecutors. Do we say that Constitutionally-mandated reasonably effective assistance requires some minimal standards which do not vary from state to state or city to city, or do we say that if Defendant has the "unfortunate" luck to run into a judge and prosecutor who are unaware of basic procedural law then Sixth Amendment reasonably effective assistance of counsel entitled the Defendant, at most, to counsel who possesses or, more appropriately, lacks, the same level of basic legal knowledge. The ramifications of such a situational Constitutional right based upon the lowest

common denominator holding is staggering.

The Third Circuit attempted to characterize the Defendant's argument as retrospective analysis. There is nothing retrospective about this analysis except the fact that the event occurred in the past. It is hardly an onerous burden to say, as have the cases cited previously, that effective counsel, when looked at prospectively, should know the basic criminal procedure.

The Third Circuit also placed great weight on the fact that trial counsel was confronted with "a new issue - the normal number of peremptory challenges - just as the trial is about to begin." Government of the Virgin Islands vs. Bradshaw, supra. at 120. To call "the normal number of peremptory challenges" a new issue when the amendment had been postponed seven months earlier stretches to immeasureable

limits any reasonable definition of "new." Finally, while there is no Constitutional right to peremptory challenges, this is not the issue. The issue is whether Constitutionally-mandated reasonably effective counsel should know the basic fundamentally-important rules of criminal procedure.

The right to peremptory challenges is not some novel or experimental concept under our judicial system.

> The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial and jury. Lewis vs. United States, 146 U.S. 370, 376, 13 S.Ct. 136 (1892).

Further, procedural rules such as the number of peremptory challenges are not random rules created out of the air but reflect a decision by our society, through its elected and appointed officials, over

a span of generations, that certain procedures are deemed necessary if we as a society are to have faith in and respect for our judicial system.

> The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with ... Id. at 374, citing Hopt. vs. Utah, 110 U.S. 574 (1884).

In this regard, the right to peremptory challenges has been recognized as one of the most important rights secured to the accused. Swain vs. State of Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965). The denial or impairment of this right is a reversible error without a showing of prejudice. Id. at 219. If trial counsel had brought the proper law to the attention of the trial Judge and the trial Judge had still granted only five peremptory challenges,

there is little doubt that Defendant's conviction would have been vacated. United States vs. Turner, 558 F.2d 535, 538 (9th Cir. 1977). However, trial counsel not only failed to fulfill his pre-existing duty to know the law but wholly failed to later look at the rules to bring the proper law to the Court's attention.

Therefore, but for trial counsel's egregious error, Defendant would be entitled to a new trial. A trial in which he would be fully given his right to attempt to empanel a jury free of any prejudice and biases which he might perceive as affecting his right to an impartial jury.

While what occurred at the empanelling of Mr. Bradshaw's jury may appear to be one incident in a massively overloaded criminal justice system, this incident stands for a much broader basic principal. The principal that, at a minimum, reason-

ably effective counsel has an independent duty to be aware of basic criminal procedure. If the Sixth Amendment standard does not encompass such a duty, the words reasonably effective are devoid of any significance.

CONCLUSION

As can be seen from the Third Circuit's decision and the decisions of the Fifth and Eleventh Circuits, where ignorance of far more subtle rules of law were found to render counsel's assistance ineffective, the Circuit Courts, vary massively as to what at a minimum represents reasonably effective assistance of counsel. While this Court cannot set absolute rules and anticipate every situation, it is obvious that a fair application of the Sixth Amendment requires some minimal standard to be established.

In this regard, total ignorance and

failure to check the law, after counsel had stated he would do so, are presumably not one of the myriad of choices confronting an attorney which must be dealt with on a case-by-case basis. Therefore, reasonably effective assistance of counsel, especially in a case involving first degree murder, should require counsel who has knowledge of the basic and fundamental important rules of criminal procedure.

Petitioner, therefore, respectfully requests this Honorable Court to grant his writ.

Respectfully submitted,

MURPHY, MUSSINA, HARRIS, TRAVIS,
RIEDERS & HUMPHREY

s/ Ron Travis
Ronald C. Travis, Esquire
Attorney for Petitioner

CERTIFICATE OF SERVICE

AND NOW comes Ronald C. Travis, Esquire, Attorney for Petitioner, and certifies that a copy of the attached Petition has been served upon Douglas L. Capdeville, Esquire, Assistant U.S. Attorney, P.O. Box 3239, Christiansted, St. Croix, U.S. Virgin Islands 00820 this 30th day of May, 1984, by first-class mail, postage prepaid.

MURPHY, MUSSINA, HARRIS, TRAVIS,
RIEDERS & HUMPHREY

s/ Ron Travis
Ronald C. Travis, Esquire
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3222

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee

v.

HENRY C. BRADSHAW,

Appellant

APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
D.C. CRIMINAL NO. 76-213-1

Argued December 7, 1983

Before: HUNTER, WEIS and
ROSENN, Circuit Judges

Opinion Filed February 2, 1984

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OPINION OF THE COURT

HUNTER, Circuit Judge.

1. On March 3, 1977, appellant Henry Bradshaw was convicted of first degree murder and sentenced to life imprisonment following a jury trial in the United States District Court of the Virgin Islands. This court upheld that conviction on direct review. Government of the Virgin Islands v. Bradshaw, 569 F.2d 777 (3d Cir.), cert. denied, 436 U.S. 956 (1978). Bradshaw then moved in the district court, pursuant to 28 U.S.C. §2255 (1976), to set aside his conviction. His motion alleged that his trial attorney had failed to render effective legal assistance. The district court

determined that Bradshaw's motion could be resolved on the basis of the allegations in the motion and the materials already on file in the district court. Bradshaw's motion to set aside the conviction was denied, and this appeal followed. For the reasons set forth below, we will affirm the order of the district court denying Bradshaw's motion.

I.

2. Ineffective assistance of counsel is the only ground that Bradshaw advances for setting aside his conviction. His motion asserts three separate allegations in support of his claim of ineffective assistance:

(1) His attorney refused to locate and interview two alibi witnesses whose proposed testimony is described in Bradshaw's motion.

(2) His attorney failed to suggest appropriate questions for voir dire, as a result

> of which the fiancee of the officer who arrested him was empaneled on the jury.
>
> (3) His attorney waived the right to exercise an additional five peremptory challenges, as a result of his mistaken view of the state of the law at the time of trial.

Bradshaw urges that his conviction should be set aside on the basis of matters already contained in the record, but he argues in the alternative that it was error for the district court to refuse to order an evidentiary hearing to develop the facts underlying his ineffective assistance claim. See United States v. Baynes, 622 F.2d 66,68 (3d Cir. 1980) (review of refusal to grant an evidentiary hearing).

3. We recognize at the outset that Bradshaw bears the burden of proving his claim of ineffective assistance of counsel. Id. at 69. Bradshaw must demonstrate that the representation he received at trial

was "constitutionally inadequate," United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174 (3d Cir.), cert. denied, 425 U.S. 997 (1976), and that he was prejudiced by his attorney's inadequacies. United States v. Swinehart, 617 F.2d 336, 340 (3d Cir. 1980). The constitutional right to effective assistance of counsel demands that the defendant's attorney exercise "the customary skill and knowledge which normally prevails at the time and place" of trial. Johnson, 531 F.2d at 174 (quoting Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970)).

4. The question whether to order an evidentiary hearing is committed to the sound discretion of the district court. Page v. United States, 462 F.2d 932, 933 (3d Cir. 1972). In exercising that discretion, however, the district court must accept the truth of the movant's factual

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allegations unless they are clearly frivolous on the basis of the existing record. United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980). Further, the court must order an evidentiary hearing to determine the facts "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." Id.; see 28 U.S.C. §2255 (1976).

5. These requirements do not mean that an evidentiary hearing must be held whenever the movant's ineffective assistance claim presents a close question. The district court need only supplement the factual record when the merits of the section 2255 motion may turn on the truth of a non-frivolous allegation. In this case, we strictly adhere to our prior case law and evaluate Bradshaw's motion under the assumption that all his allegations are factually correct. Under that standard we

find, for the reasons set forth below, that Bradshaw has not made out a claim of ineffective assistance of counsel.

II.

A. Bradshaw's Proffered Alibi Witnesses

6. Bradshaw asserts that he informed his attorney of two potential alibi witnesses. The first, a woman with whom Bradshaw claims to have spent part of the evening of the murder but whose name he cannot now recall, would have testified that Bradshaw was in Puerto Rico as of 7:00 p.m. that night. The second witness described by Bradshaw was a Puerto Rican switchboard operator who would have testified that Bradshaw spoke to her at 5:45 p.m. on the day of the murder and claimed to be at the St. Thomas airport destined for Puerto Rico.

7. The fatal blow in Bradshaw's argument is that the proposed testimony set

forth in his motion is simply irrelevant to the proofs upon which he was convicted or the alibi that he offered at trial. Witnesses testified that they heard a gunshot from the vicinity of the victim's hotel room at 4:15 p.m. (Transcript at 50-51; 61-64). The government attempted to prove that Bradshaw could have been present in the hotel room at that time; independent evidence, including Bradshaw's testimony, demonstrated that Bradshaw was in the hotel room at some time on the afternoon of the murder. (Transcript at 752-54); see Bradshaw, 569 F.2d at 770, 780. Bradshaw and another witness testified at trial that Bradshaw was at the seaplane terminal at 3:45 p.m.; two government witnesses placed him there between 4:30 p.m. and 5:00 p.m. Id. at 780. Neither story is inconsistent with the proffered testimony of the unnamed switchboard

operator that Bradshaw claimed to be at the airport at approximately 5:45 p.m. or the proposed testimony that Bradshaw was in Puerto Rico as of 7:00 p.m.

8. It is thus clear that the testimony described in Bradshaw's motion is devoid of probative value - it neither advances his cause nor discredits the government's case. See Johnson, 531 F.2d at 178 (proposed testimony not "helpful" and had little "probative force"); United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970) (burden on defendant to prove that proffered evidence would be helpful). In addition, because these two witnesses had no contact with Bradshaw while he was in the Virgin Islands, there is little possibility that they would have supplied counsel with additional information about Bradshaw's whereabouts at the time of the murder.

Further, Bradshaw's attorney did locate several alibi witnesses and skillfully developed their testimony at trial. Thus, Bradshaw's allegations on this score do not support the grant of an evidentiary hearing and cannot aid his claim of ineffective assistance of counsel.

B. Failure to Suggest Appropriate Questions for Voir Dire

9. Bradshaw alleges that one of the jurors at his trial was the fiancee of the arresting officer and the mother of at least one child by the officer as of the time she sat as a juror. The arresting officer testified at trial. Bradshaw claims that the officer's fiancee was empaneled as a result of counsel's failure to request voir dire questions concerning the relationship of potential jurors to government witnesses and police officers.

10. We need not decide whether the alleged failure would constitute ineffective assistance of counsel. Even taking as true Bradshaw's allegations regarding the relationship of one juror to the arresting officer, it is clear from the record that the voir dire conducted by the court did in fact address potential jurors' relationships with attorneys, witnesses and police officers. (Transcript of Proceedings at 1, 11). Therefore, Bradshaw's claims under this head must be rejected.

C. Failure to Exercise Five Additional Peremptory Challenges Due to Mistake of Law

11. Bradshaw contends finally that his representation at trial was constitutionally deficient because his attorney mistakenly believed that he was entitled to five peremptory challenges rather than ten. We believe that this contention, while troublesome, can be resolved without

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ordering an evidentiary hearing, and we hold on the specific facts of this case that counsel's mistake with respect to the law then in effect did not deprive Bradshaw of effective assistance of counsel.[1]

12. We have previously chronicled the circumstances that resulted in the waiver by Bradshaw's trial counsel of half his alloted peremptory challenges. See

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1. We cannot be certain whether counsel's acceptance of five peremptory challenges was the result of a mistake of law or a "tactical decision" to accept the jury as constituted after five strikes. See United States v. Baynes, 687 F.2d 659, 666 (3d Cir. 1982); Johnson, 531 F.2d at 176-77 (matters of trial strategy). Bradshaw has attempted to demonstrate that a mistake occurred, and that he was prejudiced by the error, by showing that trial counsel was not able to exclude peremptorily all the jurors that he had unsuccessfully challenged for cause. He urges an evidentiary hearing on this point. Because we hold that Bradshaw cannot prove ineffective assistance even if his counsel did commit a mistake of law, we need not remand to the district court for such a determination.

Bradshaw, 569 F.2d at 781. Bradshaw's trial commenced on February 28, 1977. At that time, as now, a defendant faced with the prospect of imprisonment for more than one year was entitled to challenge ten jurors without cause. Fed. R. Crim. P. 24 (b). On April 26, 1976, the Chief Justice of the United States transmitted an amended Rule 24(b) to Congress that would have limited a criminal defendant tried alone to five peremptory challenges in a case of this sort. The amendment was scheduled to go into effect on August 11, 1976, seven months before the date of Bradshaw's trial. On July 8, 1976, however, Congress postponed the effective date of the amendment until August 1, 1977. On July 30, 1977, the proposed amendment was rejected. See Bradshaw, 569 F.2d at 781. Thus, the proposed amended rule 24(b) was not in effect at the time of Bradshaw's trial and,

in fact, never went into effect.

13. The judge who presided over Bradshaw's trial was unaware of the history of the amendment to rule 24(b) after it was proposed by the Supreme Court. When asked by defense counsel whether additional peremptory challenges would be granted, the court responded that the "normal" five challenges would be allowed. Counsel stated his belief that he was entitled to ten peremptory strikes. The judge agreed that such was the law under the "old rules," but noted, erroneously, that rule 24(b) had been amended. The two government attorneys agreed that five challenges only were permitted by the current rules.[2]

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2. The following discussion took place among the judge, counsel for Bradshaw and the government attorneys:

MR. MOORE: There is one other matter about preemptory (sic) challenges.

No question has ever been raised that the judge and the government attorneys in fact did not know of the congressional decision to delay the implementation of the amended rule upon which they relied.

Are you inclined to grant us more than the normal amount?

THE COURT: No, I am not, not at all. The normal amount now is five.

MR. MILLIGAN: Yes, five.

MR. BRADY: Five on each side.

MR. MILLER: I thought we got 11, the Defendant having 10, and, then for the alternates an extra one.

THE COURT: That was under the old rules.

When did that statute go into effect?

MR. MILLIGAN: I think August of 1976.

THE COURT: It is different for capital cases, but this is not a capital case, although it is close to it.

14. Bradshaw's attorney acquiesced in the court's erroneous view of the law. That was his mistake. Upon that error Bradshaw fastens his present claim that his constitutional right to effective

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MR. MOORE: It is ten for capital cases.

THE COURT: And five for felonies. One of the reasons I am not enlarging the preemptories (sic) is I don't know if I can. In multiple defendants we can, but I don't think I can.

You cited that case where a Judge gave unlimited peremptories, but I don't believe he had the authority. I don't think under the Rules, the way they are written, it says there shall be five for each side, but even if I had discretion I wouldn't like to do it because I think a lot would be eliminated for cause, and that will be our biggest problem, that is to get enough jurors selected to make up a jury because there will be a lot for cause. I would say there will be five peremptories.

legal assistance was denied. To set aside Bradshaw's conviction on these facts, however, would be to misperceive the interest protected by the right to effective assistance of counsel.

15. The Constitution does not guarantee a perfect trial, nor does it mandate a flawless performance on the part of counsel. As the Supreme Court observed in another context:

> We have long recognized ... that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.

MR. MILLER: I would like to double check that. You sound like you are not absolutely sure about the rule.

THE COURT: I do not know when that went into effect but I remember checking it. I do think they are in effect since August.

(Transcript at 4-5).

Engle v. Isaac, 456 U.S. 107, 134 (1982). When a party raises an ineffective assistance claim, we are not called upon simply to determine the existence and magnitude of asserted errors in the conduct of the litigation. Our focus instead must be on the total performance of the attorney, which requires that we examine the thoroughness of his investigation and preparation, the quality of his judgment and the "particular circumstances" surrounding any alleged errors and shortcomings. Baynes, 687 F.2d at 665.

16. This court's observations in Moore v. United States, 432 F.2d 730, (3d Cir. 1970), continue to guide us in determining whether a criminal defendant has received the quality of representation that the Constitution demands - the exercise of the customary skill and knowledge prevailing at the time and place of trial:

A retrospective examination of a lawyer's representation to determine whether it was free from any error would exact a higher measure of competency than the prevailing standard. Perfection is hardly attainable and certainly is not the general rule, especially in professional work where intuitive judgments and spontaneous decisions are often required in varying circumstances. The artistry of the advocate is difficult to judge retrospectively because the elements influencing judgment usually cannot be captured on the record. The kaleidoscopic range of possibilities often seems limitless, and it is proverbial that the finest ideas emerge on the way back from the courthouse. The advocate's work, therefore, is not readily capable of later audit like a bookkeeper's. Of course, not all the activity of the advocate has this highly subjective quality. It is possible to examine the sufficiency of his preparation and the adequacy of his knowledge of the relevant law. Review may disclose failures at the trial. All these matters which will inform the judgment on a retrospective inquiry whether counsel adequately performed his duty. But since what is required is normal and not exceptional

> representation, there is little room for the realization that it would be difficult to find a case where even the ablest and most experienced trial lawyer would be completely satisfied after a searching re-examination of his conduct of a case.

Id at 736-37 (footnote omitted).

17. Guided by Moore, we must examine the knowledge, preparation and judgment of Bradshaw's counsel in light of prevailing professional standards and the particular facts of this case. Counsel's error arose when the trial judge interjected a new issue - the normal number of peremptory challenges - just as the trial was about to begin. The issue had not been briefed. Bradshaw's attorney cannot be faulted for failing to anticipate the problem, because the proposed amendment had never become law. His mistake reflected no lack of preparation or deficiency in his basic knowledge of criminal practice and proce-

dure in the federal courts.

18. Counsel's retreat from his initial request for ten peremptory challenges was based on the good faith representation of the court and the government that the number of challenges for both sides had been reduced. They backed their assertion by citing a specific amendment to the governing rule. The court and the government attorneys appeared to be knowledgeable about the amendment, agreeing on the effective date of the new rule and the appropriate number of challenges. Indeed, the trial judge even stated that he had "checked" the new rule himself before following it. See supra note 2. Thus, defense counsel did not merely retreat from a non-frivolous interpretation of the law out of meekness or an inability to articulate his position. In retrospect, counsel's acquiesence was unfortunate, but

Moore teaches that "retrospect examination" of that sort is not the test of effective assistance. Taking as true all of Bradshaw's allegations, we cannot say that his counsel failed to act with the requisite degree of skill and care in deciding on the spot whether to challenge the trial court's ruling.

19. This case is readily distinguishable from instances where an attorney simply refuses to exercise his peremptory challenges without regard for the possible adverse effect on his client. Cf. Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (trial counsel, inter alia, waived all peremptory challenges without conducting any voir dire). Further, we do not suggest that the right to challenge potential jurors without cause, as guaranteed by the Federal Rules, is not an important right.

See Pointer v. United States, 151 U.S. 396, 408 (1984) ("The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused."). But not every later-discovered trial error, even an error of constitutional magnitude, "render(s) the original trial fundamentally unfair." See Engle, 456 U.S. at 131.

20. Counsel's mistake of law, under the circumstances of this case, does not justify setting aside Bradshaw's conviction.[3] Bradshaw's attorney performed

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3. Decisions in other circuits have also held that an attorney's failure to discover important changes in the law may not, in the circumstances of a particular case, constitute ineffective assistance of counsel. See, e.g., Hernandez v. Beto, 443 F.2d 634, 635 (5th Cir.) cert. denied, 404 U.S. 897 (1971) (decision changing prior law appeared in advance sheets shortly before trial). Somewhat analagous are the cases in which counsel fails to preserved an objection at trial because of a failure to anticipate a change in the law that was foreshadowed by existing

capably at trial. He called seventeen witnesses and vigorously pursued the alibi defense pressed by Bradshaw in his section 2255 motion. He conducted an effective cross-examination on the issue of identification. The two additional grounds

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precedent. Thus, in Brunson v. Higgins, 708 F.2d 1353 (8th Cir. 1983), the appellate court rejected an ineffective assistance claim where counsel failed to challenge a Missouri jury selection system that impermissibly excluded women. The Missouri Supreme Court had previously rejected such a challenge even though the United States Supreme Court had struck down similar practices in Louisiana. Id. at 1355. Significantly, the district court's rejection of the ineffective assistance claim was affirmed even though no hearing had been conducted to determine whether other attorneys had been raising similar challenges or whether detailed statistical evidence would have been available to support the claims of discrimination. Id. at 1358.

In Honeycutt v. Mahoney, 698 F.2d 213 (1st Cir. 1983), the convicted defendant alleged that he received ineffective assistance due to counsel's failure to challenge a jury instruction that malice could be presumed and the burdon of proof on that point shifted to defendant. Such was established law in Maine regarding the presumption of malice at the time of trial

raised in Bradshaw's motion do not serve to amplify counsel's error regarding peremptory challenges, for we have demonstrated above that counsel committed no mistake in those instances. Thus, Bradshaw has not satisfied his burden of proving that counsel's performance was constitutionally defective, nor has he mustered a convincing argument that his position could be strengthened by augmenting the record.

After defendant's conviction, the United States Supreme Court declared such a shift in the burden of proof to be unconstitutional, based in large part on In re Winship, 397 U.S. 358 (1970), a case decided three years before defendant's conviction. The United States Court of Appeals for the First Circuit ahd relied on Winship to strike down a similar presumption of malice prior to defendant's trial. See Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), vacated, 414 U.S. 1139 (1974), order reinstated on remand. 496 F.2d 1303 (1st Cir. 1974). In spite of that foreshadowing of a change in the law, the court held that counsel's waiver of his constitutional challenge did not constitute ineffective assistance.

III.

21. Accordingly, for the reasons set forth above, the judgment of the district court denying Bradshaw's section 2255 motion will be affirmed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX B

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GOVERNMENT OF THE VIRGIN ISLANDS,	)	CRIMINAL NO. 76/213
Plaintiff	)	MOTION TO DISMISS AND VACATE SENTENCE PURSUANT TO 28 U.S.C. SECTION 2255
v.	)	
HENRY C. BRADSHAW,	)	
Defendant	)	

O R D E R

Petitioner, Henry C. Bradshaw ("Bradshaw"), has moved under 28 U.S.C. §2255 to vacate his sentence of life imprisonment and set aside his conviction for murder in the first degree. This Court, by order dated November 3, 1980, previously denied Bradshaw's motion to dismiss and vacate pursuant to 28 U.S.C. §2255 on the basis that the grounds alleged by Bradshaw's claim of ineffective assistance of counsel due to the alleged failure of his attorney to investigate witnesses, the Court in its November 3,

1980 Order granted Bradshaw leave to file a new motion together with a clarifying affidavit or other evidence on the issue of the alleged defective pretrial investigation of his attorney.

In his present Motion, Bradshaw simply alleges that an unidentified Puerto Rican woman should have been called to testify that Bradshaw was in Puerto Rico at the time of the murder. However, Bradshaw is unable to name this potential witness, much less give her address. Bradshaw does supply the name of the second witness, but supplies no address for her, alleging that she would have testified that on the day of the murder he told her he was on the way to Puerto Rico.

This Court cannot engage in vague speculations about the kind of investigatory defense which Bradshaw's attorney could have made in addition to those pro-

digious efforts which this Court has already described as constituting "extensive pretrial investigation and preparation of the case." See United States v. Parman, 461 F.2d 1203, 1205 (D.C. Cir. 1971). Bradshaw has not detailed the substance of the testimony of the witnesses he claims should have been called, Grimes v. United States, 444 F. Supp. 78, 80 (S.D.N.Y. 1977), and is not even able to identify one of the witnesses. See Adams v. United States, 222 F.2d 45, 47 and n. 4 (D.C. Cir. 1955).

In light of Bradshaw's inability to supply this Court with the requisite names and addresses of potential witnesses and to show that his counsel's failure to produce them was prejudicial, this Court has determined that defendant's bald allegations do not form a sufficient basis upon which to hold a 28 U.S.C. §2255 eviden-

tiary hearing; now then it is hereby

ORDERED:

THAT defendant's Motion to Dismiss and Vacate his sentence pursuant to 28 U.S.C. §2255 be, and hereby is, DENIED.

DATED this 1st day of July, 1982.

ENTER:

_____
DAVID V. O'BRIEN,
JUDGE

A T T E S T:

GEOFFREY BARNARD
Clerk of the Court

By_____
Deputy Clerk

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

GOVERNMENT OF THE VIRGIN ISLANDS,	:	CRIMINAL NO. 76/213
	:	MOTION TO DISMISS
Plaintiff	:	AND VACATE SENTENCE
	:	PURSUANT TO 28
vs.	:	U.S.C. SECTION 2255
	:	
HENRY G. BRADSHAW,	:	
	:	
Defendant	:	

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-For Plaintiff

GEORGE MARSHALL MILLER, ESQ.
Nos. 19 & 20 Kongens Gade
Charlotte Amalie, St. Thomas
U.S. Virgin Islands 00801
-For Defendant

SILVERLIGHT, Judge By Designation

MEMORANDUM OPINION WITH ATTACHED
(Filed November 3, 1980)

Henry Bradshaw was convicted of First Degree Murder on February 29, 1977 and

sentenced on March 30, 1977, as required by statute, to imprisonment for the term of his natural life, without parole or probation. This Court has examined the various motions of Mr. Bradshaw to dismiss and vacate his sentence pursuant to 28 U.S.C. Sec. 2255; his motion of December 15, 1978, his "Traverse to Respondent's Answer" received March 20, 1979, his motion in opposition to the magistrate's report of October 25, 1979, and his motion to amend his 28 U.S.C. Sec. 2255 application of July 1980. In these petitions defendant Bradshaw alleges several grounds in support of his motion. The court finds these grounds to be without merit, and for the reasons discussed below, Defendant's motion to dismiss and vacate sentence pursuant to 28 U.S.C. Sec. 2255 will be denied. However, leave will be granted to defendant to file a new motion together with a clarifying affidavit or other evidence on the issue of

the pre-trial investigation by his attorney, Mr. Miller.

Several grounds can be easily dismissed. Defendant claims that the evidence presented at trial did not warrant a conviction on the charge of first degree murder. This issue has already been disposed of on appeal in Government of the Virgin Islands v. Henry Bradshaw, 569 F.2d 777 (3rd Cir. 1978).

Bradshaw claims that his trial upon an information rather than a bill of indictment was unconstitional. However, in the Virgin Islands, indictment by grand jury is not required and all offenses are prosecuted in the District Court by information except where required by local law to be prosecuted by indictment by grand jury. Revised Organic Act of 1954, Sec. 25. No such local law has been enacted, and this procedure has been explicitly held to be constitutional. Rivera v. Government of the Virgin Islands, 375 F.2d (3rd Cir. 1967); Government of the Virgin

Islands v. Rijos, 285 F. Supp. 126 (D.C.V.I. 1968).

Bradshaw also alleges that he was denied effective assistance of counsel because his attorney failed to pusue (sic) appropriate defenses or call witnesses. Both these grounds are clearly without merit. Defendant's attorney called seventeen (17) witnesses. It may be that Bradshaw disagreed with his attorney's decision as to which witnesses to call, however, the bare allegation that counsel did not call a particular witness or witnesses without mention of any particular witness does not make out a sufficient claim of incompetency of counsel. Newton v. United States, 329 F. Supp. 90, 92 (S.D. Texas 1971).

Bradshaw's assertion that his attorney failed to pursue appropriate defenses must be similarly disregarded. The defense offered were Alibi and Indentification. Examination

of the record reveals that these defenses were vigorously pursued. The testimoney (sic) of the defendant himself at trial leads to the conclusion that no other defense would have been appropriate.

Furthermore, Defendant testified in accordance with the defense offered and must be assumed to have acquiesced in it and is now estopped from suggesting a different strategy. Lewis v. United States 585 F.2d 915 (8th Cir. 1978). In any case, Bradshaw does not even allege what other defenses should have been offered and thus has failed to present a colorable claim.

A ground for Bradshaw's claim of ineffective counsel that is more troubling is his attorney's failure to object to the granting of only five (5) rather than ten (10) peremptory challenges allowed by law at trial. See Rule 24(b), F. R. Crim. P. As noted in Government of the Virgin Islands v. Bradshaw, supra. both the trial judge and the

government attorneys were mistaken as to the number of peremptory challenges allowed, erroneously believing that a proposed law limiting such challenges to five (5) had gone into effect. Bradshaw's attorney stated that he would double-check the question, but evidently failed to do so, as he did not subsequently bring up the issue. However, both prosecution and defenses affirmatively stated that they were satisfied with the composition of the jury.

This case had been referred to Judge Holmes pursuant to the Magistrate's Act, 28 U.S.C. Sec. 636(b)(1)(B). Judge Holmes, in dealing with the failure to object to the restriction of peremptory challenges, recommended that the case be summarily dismissed without a hearing. In so recommending Judge Holmes noted the holding of the Court of Appeals that Bradshaw's attorney waived any objection to the denial

of additional peremptory challenges. Judge Holmes also noted that there was no evidence that defense counsel's actions were anything other than trial tactics.

We do not embrace the rationale of Judge Holmes' decision. The opinion of the Third Circuit holding that Bradshaw's attorney had waived objection to the denial of the additional five (5) peremptory challenges did not address the question of ineffective assistance of counsel. Also, it does not seem appropriate to categorize the failure to object to this denial as a "tactical" decision. Rather, it was an error or a mistake: either Attorney Miller researched the issue and failed to find the correct answer or he did not "double-check" the question as he stated he would do. The question, then, is whether this error or mistake constitutes ineffective assistance of counsel or requires an evidentiary hearing.

The district court must conduct an evidentiary hearing "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. Sec. 2255. See Machibroda v. United States, 368 U.S. 487, 494, 82 S.Ct. 510, 513 (1962); United States v. Williams, 615 F.2d 585, 592 (3rd Cir. 1980). As the Court writes in Machibroda, though:

> What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner. 1/

1/ 368 U.S. 487 at p. 495.

On the issue of the peremptory challenges, a hearing would provide no help. The mistake or error is evident in the record: the problem is not a factual dispute, but rather what relief, if any, is appropriate.

The standard for determining whether representation by counsel is effective for purposes of the sixth amendment has been long settled in the Third Circuit. In Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970) (en banc), the Court held: "(T)he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place." The burden of proof is on the defendant to prove that the representation by counsel was constitutionally inadequate. United States ex rel. Johnson v. Johnson, 531 F.2d 169, 174

(3rd Cir. 1976), cert. denied, 425 U.S. 997, 96 S. Ct. 2214. See United States v. Williams, supra.

Moore does not require a perfect attorney; and in this case, the Court finds that the error concerning the number of allowed peremptory challenges did not amount to a constitutional deprivation of the right to effective counsel. Indeed, both prosecuting attorneys believed the proposed legislation had already gone into effect; and the trial judge told Mr. Miller, Bradshaw's attorney, that "I do not know when that went into effect, but I remember checking it." The test of "knowledge at the particular time and place" does not reflect unfavorably on Mr. Miller here. To take the judge's word on this point should not be deemed incompetence under the test in Moore.

In addition, and of equal significance is the lack of resultant showing of prejudice from this error. Attorney Miller stated to

the record that he was satisfied with the composition of the jury. While the ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency, the question of prejudice to the client is evidentiary on the issue. Moore v. United States, supra. 432 F.2d at 737; United States ex rel. Davis v. Johnson, 495 F.2d 335, 340 (3rd Cir. 1974).

The records and files of the case thus showing conclusively that defendant is not entitled to relief on this ground, no evidentiary hearing is required on this issue.

Finally, defendant claims ineffective assistance of counsel on the ground that his attorney failed to conduct an appropriate pretrial investigation. Scrutiny of the direct and cross-examination conducted by Bradshaw's attorney reveal that they could

not have been conducted as they were without extensive pretrial investigation and preparation of the case.

Bradshaw alleges that he requested an investigation concerning a hotel in Puerto Rico and the switchboard operator at the College of the Virgin Islands. However, he has failed to present any further information concerning this allegation, such as why such an investigation would have been helpful, what the witnesses would have testified to, or whether the advisability of investigating these leads was discussed by Mr. Bradshaw with his attorney before or during his trial. The bald allegation by defendant that his attorney failed to investigate witnesses, without any further supporting information or evidence, is not a sufficent basis upon which to hold a 28 U.S.C. Sec. 2255 hearing. See Harshaw v. United States, 542 F.2d 455 (8th Cir. 1976), Short v. United States 504 F.2d 63 (6th Cir. 1974). With the information now

before this Court, it is impossible to determine whether an evidentiary hearing would be at all helpful on this issue. Thus, leave is granted the defendant to renew his motion on the issue of pretrial investigation, under oath and in writing. Any such motion should detail the names and addresses of the witnesses defendant claims to have requested his attorney to investigate, his attorney's response to his request, a general outline of what Mr. Bradshaw asserts these witnesses would have testified to if called, and a discussion of the relevance of such testimony for his case.

IRWIN J. SILVERLIGHT
JUDGE
SITTING BY DESIGNATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

GOVERNMENT OF THE VIRGIN ISLANDS,	:	CRIMINAL NO. 76/213
	:	MOTION TO DISMISS
Plaintiff	:	AND VACATE SENTENCE
	:	PURSUANT TO 28
vs.	:	U.S.C. SECTION 2255
	:	
HENRY C. BRADSHAW,	:	
	:	
Defendant	:	

O R D E R

For the reasons set forth in the memorandum opinion filed on even date herewith.

IT IS HEREBY ORDERED

That Defendant's motion to dismiss and vacate his sentence pursuant to 28 U.S.C. Sec. 2255 be, and the same hereby is, DENIED.

DATED: November 3, 1980.

ENTER:

IRWIN J. SILVERLIGHT
JUDGE
SITTING BY DESIGNATION

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1914

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee

v.

HENRY C. BRADSHAW,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF THE
VIRGIN ISLANDS
DIVISION OF ST. CROIX

Argued December 5, 1977
Before ADAMS, ROSENN and HUNTER,
Circuit Judges

Julio A. Brady
Mark B. Milligan
Attorneys for Appellee

Edward J. Ocean
Attorney for Appellant

(Filed January 24, 1978)

BEST AVAILABLE COPY

HUNTER, Circuit Judge:

Henry C. Bradshaw appeals his judgment of conviction for first degree murder. After his trial by jury in the District of the Virgin Islands, he was sentenced to life imprisonment. The appeal challenges the sufficiency of the evidence supporting the verdict and raises the question of whether a new trial should be granted because the trial judge, now, on appeal, concededly in error, allowed defendant to exercise only five peremptory challenges instead of ten.[1] For the reasons discussed below, we affirm.

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1. In oral argument counsel also raised a third point intimated in his brief, whether the instructions to the jury on the requirement of a finding of a "willful, deliberate, and premediated" killing were adequate. Trial counsel made no objection to this instruction, and we find no plain error. See F.R.Crim.P. 30; Government of the Virgin Islands v. Navarro, 513 F.2d 11, 16 (3d Cir.), cert. denied, 422 U.S. 1045 (1975).

I

Defendant was charged with first degree murder, 14 V.I.C. §922(a)(1), by an information filed November 12, 1976. Trial commenced February 28, 1977. At the start of jury selection the trial judge indicated that the law allowed defense only five peremptory challenges. Defense counsel used all five strikes.

The jury returned a guilty verdict on March 3, 1977. The hearing on sentencing was held on March 30. Bradshaw was given the mandatory sentence for first degree murder, life imprisonment without parole or probation. 14 V.I.C. §923(a).

The facts as developed at trial were as follows. On March 7, 1976, Marilyn Pickering, a St. Thomas resident, registered at a hotel in Christiansted, St. Croix. The following morning she was found shot to death. An expert testified

at trial that she had been dead for at least twelve hours before her body was found. The victim had been shot twice with a .38 caliber weapon. An autopsy showed a .22 percent level of alcohol in her blood at the time of her death and the presence of epoxy in her digestive tract. No gun was found, but a test done by investigators showed that decedent had not fired any weapons.

According to his testimony, Bradshaw became acquainted with decedent a month before the killing, when she hired him as a private detective. Subsequently, the two developed a close personal relationship. He testified that decedent had asked him to accompany her to St. Croix on the day of the shooting. Bradshaw arrived by seaplane on the island from St. Thomas the same morning as decedent thought on a different flight. He had traveled under

an assumed name.

Two hotel employees testified that they saw defendant that afternoon at the hotel. One saw him walking towards decedent's room at about 1:00 p.m. Bradshaw's fingerprint was found on a drinking glass in the room.

Although Bradshaw and one witness testified that he returned to the seaplane terminal at 3:45 p.m., two witnesses placed him there between 4:30 and 5:00 p.m. Employees at the hotel testified that they had heard a gunshot or explosion coming from the vicinity of decedent's room between 4:00 and 4:30 p.m.

After returning to St. Thomas by seaplane under another false name, Bradshaw flew under his own name to Puerto Rico for an overnight stay.

When contacted by investigators, Bradshaw acknowledged that he owned a

licensed .38 caliber Smith and Wesson revolver. He informed them, however, that the gun had that day been stolen from his car trunk. The investigators testified that they inspected the car and found no signs of tampering or break-in.

Questioned about his activities on November 7, Bradshaw told police that he had spent the day fixing his car on St. Thomas and then flew to Puerto Rico for an overnight visit. Bradshaw was later arrested.

II

At the close of the government's case against him, defendant made a motion for acquittal based on the insufficiency of the evidence. The motion was denied.

The government's brief in this appeal claims that the motion was not renewed before the jury retired nor made within seven days of the jury's verdict

under F.R.Crim.P. 29(c). Defendant's appellate counsel does not dispute this observation in his brief nor did he at oral argument. Nonetheless, in our review of the record, we have found a paper entitled "Motion for Judgment of Acquittal" dated March 7, 1977 and stamped as filed on March 10. The paper has been placed out of its chronological sequence in the record. The record indicates that the motion was heard and denied on March 30, 1977. Since the March 10 motion was filed within seven days of the March 3 jury verdict, it was timely under Rule 29(c). Contrary to the assumptions of both counsel on appeal, we find that the motion for acquittal has been properly preserved for appellate review.

The standard to be used in judging the sufficiency of the evidence after a properly preserved motion for acquittal

has been made is whether, viewing all the evidence adduced at trial in the light most favorable to the government, there is substantial evidence from which the jury could find guilty beyond a reasonable doubt. Government of the Virgin Islands v. Peterson, 507 F.2d 808, 900 (3d Cir. 1975); Government of the Virgin Islands v. Lanclos, 477 F.2d 603, 606 n. 3 (3d Cir. 1973). The standard does not differ when the government's case is based on circumstantial rather than direct evidence. United States v. Boyle, 402 F.2d 757 (3d Cir. 1968).

Although there were no witnesses to the killing of Marilyn Pickering, there is sufficient evidence in the record to support the jury's verdict that Bradshaw is guilty of first degree murder. Defendant by his own admission was on the Island with decedent. He was seen near her hotel

room close to the time of the shooting, and his fingerprint was found in the room. He admittedly owned a gun of the type and caliber which fired the fatal bullets. Further, Bradshaw was seen at the seaplane terminal the morning of November 7 with a briefcase and in the hotel with a briefcase and a large envelope. Bradshaw testified that he usually carried his gun in his briefcase. The jury could have concluded from this evidence that Bradshaw had the opportunity to commit the crime.

Bradshaw traveled both ways between St. Thomas and St. Croix under an assumed name. While Bradshaw flew from St. Thomas to St. Croix, back to St. Thomas, and then to Puerto Rico on November 7, he had earlier told his former wife that he would spend the day in Puerto Rico. This evidence would support a conclusion that Bradshaw had attempted to conceal his trip

to St. Croix as a part of planning the murder.

Bradshaw was also connected to the killing by evidence that he attempted to conceal the crime. Defendant told his former wife, his employer and police that he had traveled only to Puerto Rico on November 7. When returning to the St. Croix airboat station the afternoon of the 7th, he told an employee there that he had come from Fredericksted. He testified that his gun, the same type and caliber which had been used in the killing, had been stolen from him the same day that police came to question him. While he claimed that the trunk of his car was broken into while the car was parked in his employer's lot, police at the scene found no evidence of a break-in. The jury, from all of this material, is supported in its finding that Bradshaw was the

killer.

The circumstances of the murder could well have led the jury to conclude that the killing was a willful, deliberate, and premeditated act. The victim was quite drunk at the time of her killing. Her stomach was found to contain some epoxy, a substance which an expert at trial testified would not likely have been accidently ingested. Some rat poison was also found in her room. From this the jury could have concluded that the decedent's resistance was low and that an attempt had been made to poison her before she was shot. Combining this evidence with the supportable conclusion that Bradshaw before the shooting had attempted to conceal his trip to St. Croix and that he had carried his gun with him on the trip although not doing work at the time as a private detective, the first degree murder verdict is

supported by substantial evidence. See Government of the Virgin Islands v. Lake, 362 F.2d 770, 775-76 (3d Cir. 1966).

Bradshaw's principal defense was an alibi, that he was seen at the seaplane terminal at 3:45 p.m., while the shots were heard in the hotel between 4:00 and 4:30 p.m. One witness corroborated the alibi.

The jury, however, may have simply disbelieved the alibi. The supporting testimony came from defendant and from a policeman who was a friend of defendant's brother. The government produced two witnesses who testified that Bradshaw was at the seaplane terminal between 4:30 and 5:00 that afternoon, thus rebutting the evidence of alibi. Further, there was evidence that a clock had been torn from the wall of defendant's hotel room and was found showing a time of 4:40 p.m.

This incident could be interpreted as an early step by defendant to contrive an alibi.

In summary, while the case against Bradshaw is not based on direct testimony, there is substantial evidence that the killing of Marilyn Pickering was a willful, deliberate, and premeditated act, that Bradshaw had the opportunity to commit the crime, that he planned to conceal his presence on St. Croix both before and after the murder, and that Bradshaw hid or destroyed the murder weapon. We hold that the record contains substantial evidence to support the verdict in this case.

III

The second contention defendant raises on appeal is that the judge committed reversible error by granting only five peremptory challenges. The govern-

ment now concedes that the trial judge made an error in allocating peremptory strikes to the parties. When the judge was asked by defense trial counsel whether he would be inclined to grant more than the usual number of peremptory challenges,[2] the judge responded

> No, I am not, not at all. The normal amount now is five.

The United States attorneys present affirmed that the law permitted five. The judge and the United States attorneys were following the proposed amendment to Federal Rule of Criminal Procedure 24(b) which was transmitted to Congress by the Chief Justice of the United States on April 26, 1976. The amendment would have changed the number of peremptory strikes

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2. But see Blount v. Jugoslavenska Linijska Plovidba, No. 75-2025 (3d Cir. filed Dec. 8, 1977).

allowed in single-defendant non-capital cases involving punishment of imprisonment for more than one year from ten to five.[3] See Proposed Amendment to F.R. Crim.P. 24(b), H.R. Doc. No. 94-464, at 1-6 (1976), reprinted in 44 U.S.L.W. 4549 (U.S. April 27, 1976). The amendment was to have taken effect on August 1, 1976.

On July 8, 1976, Congress postponed the effective date of the amendment to Rule 24(b) until August 1, 1977. 90 Stat. 822, see 425 U.S. 1157 (1976). On July 30, 1977, a second bill was signed disaproving the amendment. 91 Stat. 319.

Bradshaw's jury was selected on

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3. The current version of F.R.Crim. P. 24(b) provides in part:

> If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges.

February 28, 1977. The law effective on that date, as now, entitled him to ten peremptory challenges. Although the trial judge made it clear that he would allow only five strikes, we find that reversal is not appropriate since defendant waived objection to the ruling.

There is no question of the good faith of the trial judge or of the government attorneys in this case. The record reflects that they simply were not aware of the Congressional decision to delay implementation of the amendment to Rule 24(b). Defendant does not contend otherwise.

The record shows that defense counsel not only failed to preserve an objection to the decision of the trial judge, but also that he accepted the ruling. During the discussion over the number of challenges, trial counsel first

noted that he thought that he would be entitled to ten peremptory challenges plus one extra for the alternates to be chosen. The judge responded that ten was the number under the "old rules." After some further discussion, defense counsel concluded:

> I would like to double check that. You sound like you are not absolutely sure about the rule.

When the jury was finally impaneled after a short-recess, both counsel affirmatively stated that they were satisfied with the composition of the jury. There was never an explicit objection that the amendment had not come into effect, and at no point during the four-day trial did defendant raise issue again.

Once told by defense counsel that he would "double check" the law on peremptory challenges, the court was justi-

fied in assuming that counsel would do so and bring any error of law to the court's attention. Instead, the argument of law on the number of strikes is presented now for the first time on appeal. Under these circumstances, we hold that counsel waived objection to the denial of the five additional peremptory strikes. See generally Estelle v. Williams, 425 U.S. 501, 508 (1976); Government of the Virgin Islands v. Torres, 476 F.2d 486, 490 n. 2 (3d Cir. 1973).

Finding no reversible error, we affirm.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3222

GOVERNMENT OF THE VIRGIN ISLANDS

vs.

BRADSHAW, Henry C.

Henry C. Bradshaw, Appellant

(D.C. Crim. No. 76-213-1)
ON APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX,
CHRISTIANSTED JURISDICTION

Present: HUNTER, WEIS and ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and was argued by counsel December 7, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered April 6, 1983, be, and the

same is hereby affirmed. Costs taxes against appellant.

ATTEST:

Clerk

February 2, 1984

Certified as a true copy and issued in lieu of a formal mandate on April 6, 1984.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3222

GOVERNMENT OF THE VIRGIN ISLANDS

vs.

HENRY C. BRADSHAW, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until April 5, 1984.

Circuit Judge

Dated: March 19, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3222

GOVERNMENT OF THE VIRGIN ISLANDS,

Appellee

v.

HENRY C. BRADSHAW,

Appellant

PETITION FOR REHEARING

The petition for rehearing filed by Henry C. Bradshaw, Appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

_____
Judge

Dated: February 28, 1984